Office-Supreme Court, U.S.
FILED
JUL 24 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1778

In the Supreme Court of the United States

OCTOBER TERM, 1980

TRANSCO SECURITY, INC. OF OHIO
and FRED GAVIGLIA, PETITIONERS

v.

ROLAND G. FREEMAN, III, ADMINISTRATOR
and GENERAL SERVICES ADMINISTRATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether, in remanding this case to the district court to require that a government contractor be given adequate notice of the reasons for his suspension from bidding on, or being awarded, government contracts, the court of appeals correctly ruled that the federal regulations under which the General Services Administration temporarily suspended the contractor pending the outcome of an ongoing criminal investigation comply with the requirements of due process.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-14) is reported at 639 F.2d 318. The opinion of the district court (Pet. App. B-1 to B-6) is unreported.

JURISDICTION

The judgment of the court of appeals (App. A, *infra*) was entered on January 23, 1981. The peti-

tion for a writ of certiorari was filed on April 22, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Federal Procurement Regulations (41 C.F.R. 1-1.600 *et seq.*) provide for the suspension of a government contractor from bidding on, or being awarded, contracts by a federal agency pending the completion of an investigation of alleged wrongdoing and any legal proceeding that may ensue. Section 1-1.605-1 provides:

> (a) An agency may, in the interest of the Government, suspend a firm or individual:
>
> (1) Suspected, upon adequate evidence,[1] of—
>
> (i) Commission of fraud or a criminal offense as an incident to obtaining, attempting to obtain, or in the performance of a public contract * * *.

"Suspension" is defined by the regulations as "a disqualification from Government contracting and sub-

---

[1] The standard for weighing the sufficiency of the evidence needed to support a suspension is described as follows (41 C.F.R. 1-1.605(b)):

> Suspension is a drastic action and, as such, shall not be based upon an unsupported accusation. In assessing whether adequate evidence exists for invoking a suspension, consideration should be given to the amount of credible evidence which is available, to the existence or absence of corroboration as to important allegations, as well as to the inferences which may properly be drawn from the existence or absence of affirmative facts. This assessment should include an examination of basic documents, such as contracts, inspection reports, and correspondence. * * *

contracting for a temporary period of time because a concern or individual is suspected upon adequate evidence (see § 1-1.605) of engaging in criminal, fraudulent or seriously improper conduct." 41 C.F.R. 1-1.601-1(b).

The firm or individual suspended must be furnished immediately with a notice of suspension by registered mail (41 C.F.R. 1-1.605-3). The notice of suspension must state that the suspension is based on one of the following grounds (*id.* at 1-1.605-3(a)):

> (1) an outstanding indictment, or (2) adequate evidence that the firm or individual has committed irregularities of a serious nature in business dealings with the Government, or (3) adequate evidence of irregularities which seriously reflect on the propriety of further dealings of the firm or individual with the Government. (The notice shall identify the indictment or describe the nature of the irregularities, in general terms, without disclosing the Government's evidence) * * *.

Except in those cases in which the suspension is based on an outstanding indictment, the suspended bidder may request a hearing (41 C.F.R. 1-1.605-4(a)), which is to be held within 20 days if the request is granted (*id* at 1-1.605-3(f)). Upon receipt of a request for a hearing, the agency requests the formal advice of the Department of Justice "concerning the impact of release of evidentiary material on possible civil or criminal action against [the] firm or individual (*id.* at 1-1.605-4(b)). If it is determined by the head of the agency or his designee that "to hold a hearing would adversely affect possible civil or criminal prosecution" (*id.* at 1-1.605-4(e)), a hearing may be denied. But "information or argument

in opposition to the suspension may be presented in person, in writing, or through representation [and] * * * if such action is deemed warranted, the suspension shall be terminated" (*ibid.*).

The regulations also prescribe the maximum period of a suspension (41 C.F.R. 1-1.605-2(a)). The suspension must be terminated within 12 months from the date of the notice of suspension, unless prosecutive action has been initiated by the Department of Justice or an Assistant Attorney General requests continuance of the suspension (*ibid.*). If an Assistant Attorney General makes such a request, the suspension may be continued for an additional six months, but "[i]n no event shall a suspension continue beyond 18 months unless prosecutive action has been initiated within that period" (*ibid.*).

2. Petitioners Transco Security, Inc. of Ohio (hereinafter "Transco-Ohio") and Fred Gaviglia, Transco-Ohio's president and principal owner, are in the business of providing security services to Federal government agencies (Pet. App. A-1). They were suspended from bidding on government contracts pursuant to the federal regulations described above. The following events led to the suspension. Initially, petitioner Gaviglia was president of another corporation, Transco Security, Inc. of Delaware (hereinafter "Transco-Delaware"). On September 2, 1976, Transco-Delaware was awarded a GSA contract under the small business set-aside provisions of the Small Business Act, 15 U.S.C. 644, to provide security services at GSA buildings in the Cincinnati, Ohio area (Pet. App. A-1 to A-2). Several weeks later, the Small Business Administration (hereinafter "SBA") determined that Transco-Delaware did not qualify as a small business because of the relation-

ship of one of its owners to a Chicago-based janitorial services company (*id.* at A-2). Thereafter, petitioner Gaviglia and his wife ostensibly purchased all of the outstanding interest in Transco-Delaware and arranged for the firm to be managed by a firm associated with the Chicago-based janitorial services company (*ibid.*). Subsequently, SBA's Size Appeals Board ruled that Transco-Delaware qualified as a small business (*ibid.*). In August 1978, GSA awarded Transco-Delaware guard services contracts for Cleveland and Cincinnati (*ibid.*).

In September 1978, Transco-Delaware ceased to exist, and petitioner Gaviglia founded Transco-Ohio, which took over all outstanding contracts of Transco-Delaware, including the Cincinnati contract (Pet. App. A-2). On January 28, 1980, two days before the expiration of the existing Cincinnati contract and the effective date of a new Cincinnati contract, GSA, through its Commissioner of Public Buildings Service, A.R. Marschall, notified petitioners by separate letters that the Commission's office was "in receipt of evidence that Transco Security, Incorporated, a Delaware corporation, and Transco Security of Ohio have engaged in the commission of fraud as an incident to obtaining and performing public contracts for the General Services Administration" (J.App. 43, 45, 47).[2] Based on that evidence, the letters stated, Transco-Delaware, Transco-Ohio, and petitioner Gaviglia were being "suspended from doing business throughout the General Services Administration" for a "temporary period of time, pending the completion of an investigation and such legal proceedings as may ensue" (*ibid.*). They were advised that they could

[2] "J.App." refers to the Joint Appendix filed in the court of appeals.

> release of such information to Transco Security. If the court deems it appropriate, we have no objection to the court's *in camera* review of such material.

Accordingly, on March 6, 1980, Commissioner Marschall notified petitioners that he was denying their request for a hearing, stating (J.App. 222, 223) that "[b]ased upon the advice which has been received from the Justice Department, I determine that substantial interests of the Government would be prejudiced if a hearing were held." The notice also informed petitioners that Commissioner Marschall would, pursuant to 41 C.F.R. 1-1.605-4(e), "consider any information or argument you wish to present either orally or in writing, in person or through representation in opposition to the suspension" and that any information or argument presented to him would be promptly considered in determining whether a continuation of the suspension was warranted (J. App. 222, 223). Petitioners presented no information or argument to Commissioner Marschall.

Shortly after the suspension was imposed, GSA awarded the contract for guard services in Cincinnati to another company (Pet. App. A-3). Although Transco-Ohio submitted the low bid for that contract, it was ineligible for consideration as a result of the suspension. Performance of the contract began on March 1, 1980.

3. On February 26, 1980, petitioners filed this action in the United States District Court for the Southern District of Ohio, seeking, *inter alia*, to set aside the suspension and enjoin GSA from precluding them from bidding on contracts (Pet. App. A-3; J. App. 3-10). Petitioners filed a motion for a temporary restraining order on the same day (J.A. 17). The district court treated the motion as a mo-

tion for a preliminary injunction and held a hearing two days later. In addition to the evidence presented in open court at that hearing, the government presented certain evidence *in camera* to the district court in order to prevent disclosure of information that would interfere with its ongoing criminal investigation. On February 29, 1980, the district court denied the motion for a preliminary injunction because petitioners "failed to demonstrate a substantial likelihood that they will eventually prevail on the merits" (J.App. 167). The court—ruling before GSA Commissioner Marschall's March 6, 1980, denial of petitioners' request for a hearing—stated (Pet. App. B-5 to B-6):

> [T]he Court finds and/or concludes that plaintiffs have not been denied due process thus far and there is no showing of a likelihood that they will be denied due process, *i.e.*, that they will not [*sic*] be denied a hearing or, if a hearing is denied (as we expect it will be), that plaintiffs will not be given the opportunity to present any information or argument in opposition to the suspension in person, in writing, or through representation as provided in 41 C.F.R. § 1-1.605-4(e).

Petitioners appealed from this denial of a preliminary injunction. The court of appeals reversed and remanded, holding that "[t]he general notice which [petitioners] received did not permit adequate preparation for participation in a meaningful way in any forthcoming hearing or equivalent proceeding" (Pet. App. A-9). The court, however, rejected petitioners' challenges to the other aspects of the suspension procedures used by GSA pursuant to federal regulations, stating (Pet. App. A-12):

> Once a determination of adequate evidence has been made, specific notice of the reasons for

suspension have been timely provided, and the contractor, having been denied a hearing, has presented information or argument, the possibility of a lengthy suspension based on mere suspicion, unfounded allegation, and clear error no longer exists. Having provided these preliminary procedural safeguards, we do not believe it is unreasonable that the government should then have a period of 12 months (or 18 months should the Assistant Attorney General request an additional six months) in which to prepare its case and decide whether to indict. During that period the government's interest in not dealing with a contractor which it has probable cause to suspect of wrongdoing outweighs the contractor's interest in being awarded and performing government contracts.

ARGUMENT

The issue presented for resolution by this Court has been rendered moot and is therefore not justiciable. In any event, even were this case found to come within an exception to the mootness doctrine, review by this Court would not be warranted because the decision of the court of appeals is correct and does not conflict with any decision of this Court or of other courts of appeals.

1. The order reviewed by the court of appeals was the district court's order denying petitioners' request for preliminary injunctive relief. Petitioners had sought a preliminary order either enjoining GSA from awarding the contracts in question until a final determination was made "in accordance with due process of law, of Transco's entitlement to provide [the contract] services[,]" or, alternatively, requiring GSA actually to award Transco the contracts until such a procedurally adequate determination had been made (J.App. 9). Petitioners contended,

as they do here, that they are entitled to an adversary hearing on the fraud charges that gave rise to the suspension and that procedures permitting their suspension on the basis of suspicion of fraud supported by what the agency finds to be adequate evidence, without the grant of such a hearing, are constitutionally infirm.

That due process question is now moot. On July 14, 1981, petitioner Gaviglia was indicted by a federal grand jury on charges of devising "a scheme and artifice to defraud the United States General Services Administration and the United States Small Business Administration."[3] Those charges can now be resolved through the adversary hearing procedures of a criminal trial. Moreover, the existence of this indictment provides an independent basis for the suspension (see 41 C.F.R. 1-1.605-3(a)(1)), and the procedures petitioners seek to challenge are inapplicable to persons subject to indictment (41 C.F.R. 1-1.605-4(a)). Petitioners' remaining damage claim for the alleged "appropriation and use by G.S.A. of Transco's employees to provide the security services previously supplied by Transco" (J.App. 10), based on its separate "Third Cause of Action" (J.App. 9), is not related to the due process issues raised in the petition. Thus, like *University of Texas* v. *Camenisch*, No. 80-317 (Apr. 29, 1981), slip op. 3, "[t]his * * * is simply another instance in which one issue in a case has become moot, but the case as a whole remains alive because other issues have not become moot." Furthermore, as in *Camenisch*, the existence of justiciable issues pending in the court below does not make the issue presented for review in this Court justiciable.

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[3] Indictment at 2. A copy of that indictment is being lodged with the Clerk of this Court.

Petitioners also appear to recognize that the due process issue would be mooted on July 28, 1981, by the expiration of the maximum 18-month period during which a suspension may continue in the absence of a criminal indictment (see 41 C.F.R. 1-1.605-2(a)). They nonetheless argue (Pet. 6 n.2; citation omitted) that the issue should not be considered moot because the challenged suspension action was "in its duration, too short to be fully litigated, and there is a reasonable expectation that petitioners would be subject to the same action again." Even assuming that petitioners are correct in suggesting that an 18-month period is too brief ever to allow full litigation of the due process issue, however, their argument is unavailing because of the intervening indictment. That indictment eliminates any realistic possibility that petitioners will be subject to "the same action" again. As explained above, the challenged agency procedures are totally inapplicable to any future suspensions based on an indictment. Moreover, the due process issue is not one that inherently evades review. If it were raised in a complaint seeking injunctive relief for a class of similarly situated contractors, *e.g.*, relief in the form of an order enjoining the agency from maintaining the challenged regulations, the issue would not become moot by virtue of the expiration of the named plaintiff's maximum suspension period. *Sosna* v. *Iowa*, 419 U.S. 393 (1975).[4]

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[4] Although the issue presented in the petition is moot, there is no reason for this Court to vacate the judgment of the court of appeals. As we show below, petitioners' claim would not merit review even in the absence of a suggestion of mootness. This case is thus unlike those that become moot after a grant of certiorari, thereby depriving this Court of jurisdic-

2. Contrary to petitioner's contentions (Pet. 9-20), the decision of the court of appeals is fully consistent with established law. The regulations prescribing the procedures used in this case were adopted following *Horne Bros., Inc.* v. *Laird*, 463 F.2d 1268 (D.C. Cir. 1972), and were intended to comply with the due process requirements specified in that case. See 39 Fed. Reg. 13777 (1974). Petitioners complain that they were denied a due process right because those procedures did not accord them a trial-type hearing on the fraud allegations. But due process "does not require a trial-type hearing in every conceivable case of government impairment of private interest." *Cafeteria & Restaurant Workers Union, Local 473* v. *McElroy*, 367 U.S. 886, 894 (1961). Indeed, "[t]he very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." *Id.* at 895. Instead, the procedural protections required by due process are those that "the particular situation demands." *Morrissey* v. *Brewer*, 408 U.S. 471, 481 (1972); *Greenholtz* v. *Nebraska Penal Inmates*, 442 U.S. 1, 12-13 (1979).

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tion to decide a legal issue that is worthy of review. See, *e.g.*, *Weinstein* v. *Bradford*, 423 U.S. 147 (1975). Similarly, the rule applicable to cases that become moot while on appeal is inapposite here, since in such instances the appellant has been deprived of his statutory right to an appellate resolution of the controversy. See *United States* v. *Munsingwear, Inc.*, 340 U.S. 36 (1950). By contrast, "review on writ of certiorari is not a matter of right * * *." Sup. Ct. R. 17.1. If the Court would have denied the petition in any event, a litigant who seeks certiorari on an issue that becomes moot while his petition is pending is deprived of nothing to which he would otherwise have been entitled when the Court denies the petition and leaves the judgment below undisturbed.

Following this Court's guidance in *Mathews* v. *Eldridge*, 424 U.S. 319, 335 (1976), the court of appeals carefully considered (Pet. App. A-6 to A-7) three factors: the private interests of the party seeking additional procedural protections, the government's interest in utilizing the current procedures, and "the risk of [an] erroneous deprivation" of the private party's interest if additional protections are not provided.

First, the court balanced the government's interests in not dealing with a contractor reasonably suspected to be a wrongdoer and in protecting the integrity of a potential criminal prosecution against the contractor's interest in receiving government contracts during the pendency of a criminal investigation of his conduct. The court properly concluded (Pet. App. A-7 to A-8) that, when adequate notice of the charges is given, the balance struck by the regulations is appropriate and constitutionally permissible. The governmental interests protected by this procedure are important. Holding a full trial-type hearing on fraud charges during a criminal investigation of those charges, and thereby divulging evidence pertinent to the investigation, could greatly hamper the government's ability to proceed with an effective criminal prosecution. Furthermore, deferring suspension of security organizations operated by persons who reasonably are suspected of defrauding the government would unduly interfere with the responsibilities of GSA under 40 U.S.C. 318 to protect federal property within its jurisdiction. The contractor's interest in avoiding suspension and harm to his reputation is displaced only to the extent necessary to protect those weighty governmental interests. The suspension is temporary, and the request for a trial-type hearing is denied only when

an appropriate official of the Department of Justice advises the GSA that a hearing "would adversely affect possible civil or criminal prosecution." 41 C.F.R. 1-1.605-4(e).

Most importantly, the court of appeals correctly concluded (Pet. App. A-7) that, under this procedure, "the risk of erroneous deprivation of [petitioners'] interest is slight." A suspended party is not deprived of an opportunity to argue against the suspension, for even when a trial-type hearing is denied, the party is afforded a full opportunity to present any information or arguments in opposition to the suspension in person, in writing, or through a legal representative (41 C.F.R. 1-1.605-4(e)). Moreover, under the court of appeals' decision, a party in cases such as this is entitled to a notice of charges sufficiently specific to make the opportunity to argue against the suspension a meaningful one (Pet. App. A-11 to A-12).[5]

In sum, the court of appeals properly balanced the public and private interests involved in this case. Contrary to petitioners' assertion (Pet. 6), the decision below does not conflict with *Wisconsin* v. *Constantineau*, 400 U.S. 433 (1971), or *Joint Anti-Fascist Committee* v. *McGrath*, 341 U.S. 123 (1951). In both of those cases, the government actions were taken without any notice or opportunity for the injured party to respond to the charges against it.[6]

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[5] GSA provided more specific notice of the charges to petitioners on Feb. 2, 1981. See App. B, *infra*. The proceedings in the district court have been held in abeyance pending the disposition of this petition, so the court has not ruled on the constitutional adequacy of the new notice.

[6] The decision below similarly does not, as petitioners assert (Pet. 6), conflict with any decisions of the District of Colum-

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

LAWRENCE G. WALLACE
Acting Solicitor General

STUART E. SCHIFFER
Acting Assistant Attorney General

ANTHONY J. STEINMEYER
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Attorneys

JULY 1981

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bia Circuit. *Gonzalez* v. *Freeman*, 334 F.2d 570 (D.C. Cir. 1964), on which petitioners principally rely (Pet. 6, 11, 14), involved a contract debarment by an agency which had no published procedures for taking such action. The court held (334 F.2d at 580) that the relevant statutes did not authorize "debarment without either regulations establishing standards and a procedure which are both fair and uniform or basically fair treatment of [the debarred party]." It declined to reach the constitutional issue presented (*ibid.*). Far from creating a conflict with the District of Columbia Circuit, the court below specifically relied (see, *e.g.*, Pet. App. A-7, A-8, A-10, A-11) on two decisions of that circuit—*Horne Bros., Inc.* v. *Laird*, *supra*, and *Old Dominion Dairy Products, Inc.* v. *Secretary of Defense*, 631 F.2d 953 (1980)—both of which were decided after *Gonzalez*.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 80-3155

TRANSCO SECURITY, INC. OF OHIO and FRED GAVIGLIA, PLAINTIFFS-APPELLANTS

v.

ROLAND G. FREEMAN, III, Administrator, and GENERAL SERVICES ADMINISTRATION, DEFENDANTS-APPELLEES

Filed Jan. 23, 1981

Before: ENGEL, MERRITT and KENNEDY, Circuit Judges.

JUDGMENT

APPEAL from the United States District Court for the Southern District of Ohio

THIS CAUSE came on to be heard on the record from the United States District Court for the Southern District of Ohio and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby reversed and the cause remanded for further proceedings.

It is further ordered that Plaintiffs-Appellants recover from Defendants-Appellees the costs on appeal,

as itemized below, and that execution therefor issue out of said District Court if necessary.

ENTERED BY ORDER
OF THE COURT.

/s/ John P. Hehman
JOHN P. HEHMAN
Clerk

A True Copy.

Attest:

/s/ [Illegible]
[ILLEGIBLE]
Deputy Clerk

Issued as Mandate:

March 3, 1981

COSTS: None

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Printing .....$

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APPENDIX B

GSA
GENERAL SERVICES ADMINISTRATION
PUBLIC BUILDINGS SERVICE
Washington, DC 20405

Feb. 2, 1981

REGISTERED MAIL—
RETURN RECEIPT REQUESTED

Transco Security of Ohio
9636 Cincinnati—Columbus Road
Cincinnati, OH 45241

Gentlemen:

As I indicated to you in my letters of January 28 and February 15, 1980, this office is in receipt of evidence that Transco Security of Ohio, Transco Security, Inc. of Delaware, and Fred Gaviglia have engaged in the commission of fraud as an incident to obtaining, attempting to obtain, and performing public contracts for the General Services Administration (GSA). In accordance with the January 23, 1981, directives of the U.S. Court of Appeals in their decision in *Transco Security, Inc. et al.* v. *Freeman, et al.*, this letter will serve as specific notice to you regarding the existence of adequate evidence of fraud, which led to the January 28, 1980, suspensions under the provisions of 1-1.605-1(a)(1)(i) of the Federal Procurement Regulations (FPR).

1. *Misrepresentations by the corporation regarding its eligibility for public contracts.* In 1976 and 1977, the eligibility of Transco Security, Inc. of Delaware, for small business set-aside contracts was challenged

before the Small Business Administration (SBA) Regional Office in Chicago, Illinois and before the SBA Size Appeals Board in Washington, D.C. Adequate evidence has been presented which indicates that Fred Gaviglia and Transco Security, Inc. of Delaware, repeatedly misrepresented their size to the SBA in the course of the size determination proceedings. Specifically, Fred Gaviglia and Transco Security, Inc. of Delaware, misrepresented the absence of an affiliation with Transcontinental Cleaning Co. Inc. The existence of this affiliation made Transco Security, Inc. of Delaware, a large business, and, therefore, the corporation was ineligible for the award of any small business set-aside contracts. Fred Gaviglia and Transco Security, Inc. of Delaware, then misrepresented their size to GSA in their solicitations for the award of contracts, and as a result of these misrepresentations, were awarded three small business set-aside contracts:

a. GS-05B-41886 for guard service in Cincinnati, OH, dated August 15, 1977.

b. GS-05B-27502 for guard service in Cleveland, OH, dated August 1, 1978.

c. GS-05B-41886 for guard service in Cincinnati, OH, dated August 15, 1978.

2. *Billing irregularities by Transco Security of Ohio and Transco Security, Inc. of Delaware.* As a result of a review of time and attendance records submitted by Transco Security of Ohio and Transco Security, Inc. of Delaware, to support billing invoices of these corporations on GSA contract GS-05B-41886, adequate evidence has been produced which indicates that these corporations and their President, Fred Gaviglia, overbilled GSA for services not provided.

As I stated to you in my letter of March 6, 1980, I have determined in accordance with FPR 1-1.605-4(e), that substantial interests of the Government would be prejudiced if hearings were to be held in this case. However, I will consider any information or argument you wish to present, either orally or in writing, in person or through representation, in opposition to the suspension.

Please be advised that a copy of this letter will be provided to your attorney.

Very truly yours,

/s/ A. R. Marschall
A. R. MARSCHALL
Commissioner

cc:

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